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In The

Supreme Court of the United States

October Term, 1993

LLOYD E. SCHLUP, JR.,

Petitioner,

v.

PAUL DELO, Superintendent,
Potosi Correctional Center,

Respondent.

On Writ Of Certiorari To The Eighth Circuit Court Of Appeals

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the standard of *Sawyer v. Whitley*, 112 S. Ct. 2514 (1992) or the standard of *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), defines the kind of miscarriage of justice which permits the consideration of an otherwise-barred constitutional claim regarding the determination of guilt or innocence in a capital case.

2. Whether, if *Sawyer's* standard applies, it requires a habeas petitioner to show that the evidence of guilt was constitutionally insufficient to support conviction.

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OPINIONS BELOW

The opinion of the divided panel of the United States Court of Appeals for the Eighth Circuit is published as *Schlup v. Delo*, 11 F.3d 738 (8th Cir. 1993); it is set out in full in the Joint Appendix. JA 131-172. The Order of the Court of Appeals denying Petitioner's Suggestion for Rehearing *En Banc*, with a dissent by Chief Judge Arnold and two other judges, is appended to the panel opinion in the Federal Reporter and in the Joint Appendix. JA 172-175. The decision of the United States District Court for the Western District of Missouri dismissing the habeas petition is unpublished; it appears in the Joint Appendix at JA 68-88. The order of the District Court denying Petitioner's motion to amend under CR 59(e) appears at JA 130.

JURISDICTION

The decision of the Court of Appeals was issued on November 15, 1993. A Petition for Rehearing *En Banc* was denied on November 17, 1993. JA 131. The Petition for Writ of Certiorari was timely filed on Monday, February 14, 1994.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the United States Constitution, which provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves 28 U.S.C. § 2244(b), which provides:

> When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the

> merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the other application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

This case also involves Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts, which provides:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

STATEMENT OF THE CASE

Petitioner Lloyd Schlup was convicted and sentenced to death for the February 3, 1984 murder of Arthur Dade, a fellow prisoner at the Missouri State Penitentiary. The murder occurred on "1 Walk"[1] in Housing Unit 5A of the penitentiary,

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[1] There are four floors in Housing Unit 5. On each floor are two rows of cells, one facing north and one facing south. Each row of cells is called a "walk." There are approximately 22 cells on each walk. (A diagram of the housing unit was admitted into evidence at trial, but was placed under seal in the District Court. A schematic roughly showing the relative locations of the cells of the various prisoners involved is attached as Exhibit A.)

as the inmates were being released from their cells for lunch. JA 68.

Mr. Schlup was arrested in the prison dining room within five minutes of the murder, but no physical evidence linked him with the crime. Although Dade was repeatedly stabbed, laboratory tests of Schlup's shoes and clothing revealed no trace of blood. JA 105.

A videotape from a surveillance camera in the prison dining room, two floors and several hundred feet from the scene of the crime, shows that Schlup was the first of several inmates to walk into the dining room and get in line for lunch. JA 12. The videotape also shows that approximately one minute and five seconds after Schlup entered the dining room, several guards ran out of the room, in obvious response to a radio distress call. JA 97. Twenty-six seconds after the guards had run out of the room, the tape shows one of Dade's killers, Robert O'Neal, run into the dining room, dripping blood. JA 97, 155. Rather than go through the lunch line, O'Neal cuts to the right and runs around the side of the dining room to a back table. JA 97. Randy Jordan – the man Petitioner's evidence shows actually assisted O'Neal in the murder – follows O'Neal into the dining room and sits beside him. JA 96.

Although the videotape was presented to the jury at trial, the prosecution argued that Schlup had time to participate in the stabbing and then run to the dining room by the time the tape shows him there. JA 36. There was abundant evidence that Schlup did not and could not have done that – most notably, the testimony of a corrections lieutenant who saw Schlup walk to the dining room and searched Schlup before he entered it, JA 157-58 – but the jury never heard most of this evidence. Nor did the jury hear from any of the inmate eyewitnesses to the stabbing – including friends of Dade who had no reason to lie to help his murderer – every one of whom swears Schlup was not involved.

This evidence was never placed before any court until the successive federal habeas petition was filed in the District Court below. The petition alleged that the evidence was not previously presented because Lloyd Schlup's appointed trial lawyer did not investigate the case, the prosecution did not disclose exculpatory evidence in its possession, and Schlup's appointed counsel in his state postconviction and first federal habeas petitions failed to do the investigation that Schlup and his family implored them to do. JA 145. The courts below found that none of that constituted "cause" permitting Schlup to relitigate his constitutional claims, and that Schlup had not shown that a bar to those claims would result in a fundamental miscarriage of justice.

1. The Evidence at Trial.

Three inmates were charged with Arthur Dade's murder: Rodney Stewart, who was caught at the scene; Robert O'Neal; and Lloyd Schlup. The three were tried separately; Schlup was the last of the three to be tried. JA 68-69. His trial lasted a total of two days. JA 159.

The only real evidence against Schlup at trial came from two corrections officers who claimed to have seen the murder. Only one of these witnesses, Sgt. Roger Flowers, appeared before the jury; the testimony of the other, Officer John Maylee, was presented by deposition. JA 79.

Sgt. Flowers testified that, as the inmates were leaving 1 Walk for lunch, he saw Rodney Stewart, an inmate from 2 Walk, walking against the flow of traffic and carrying a cup of what appeared to be steaming liquid, which he threw in Arthur Dade's face. As Dade put his hands over his face, Flowers said he saw Robert O'Neal and Lloyd Schlup attack Dade from behind. Trial transcript (Tr.) 242. Flowers testified that all four inmates fell to the ground, and he shouted for help and then went onto the Walk to break up the fight. Tr. 243. He said he grabbed Stewart, and O'Neal and Schlup fled, but that he did not see where they went. Tr. 244; JA 35. He then took Stewart downstairs, where he met Captain James Eberle. Tr. 245. Capt. Eberle testified that he then went up to

the housing unit, saw Dade being put on a stretcher,[2] and called for assistance on his radio. Tr. 209; JA 35.

Officer John Maylee's deposition told a somewhat different story. Maylee said that he was on the very top level of the four-story housing unit when he saw O'Neal, Stewart and Schlup running together toward Dade. Tr. 332. He said that Stewart threw something in Dade's face, and then Stewart and Schlup held Dade while O'Neal stabbed him. Tr. 342. According to Maylee, only Dade fell to the ground. Tr. 338. Although Maylee claimed he saw the whole fight, he said he did not see Sgt. Flowers at all. Tr. 338-39, 356.

The prosecution sought to square this testimony with the videotape of Schlup in the dining room by arguing that the stabbing took place two to three minutes before Schlup appears on the tape. The key to this prosecution theory was the radio call to which the videotape shows the officers in the dining room responding, a minute and five seconds after Schlup enters the room. The prosecution theory was that this call must have been made by Captain Eberle, because he was the first officer to arrive at the scene with a radio. Tr. 209.[3] Tr. 208. Eberle testified he went to the scene of the stabbing after he saw Flowers with Stewart, downstairs. At Schlup's trial, Flowers said it took him up to two minutes to get Stewart under control,[4] and Eberle estimated it took him a minute to climb the stairs.[5] A prison investigator testified that he had measured the time required to travel from the housing

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[2] In Roger Flowers' first deposition, he stated twice that Arthur Dade was taken from the housing unit on a stretcher *before* he went downstairs and notified Captain Eberle there was trouble in the housing unit. See note 19, below. This was not brought out at Schlup's trial.

[3] The jury was not informed that there was a telephone a few feet away, which Inmate Clerk John Green told investigators he had used to call base and report the fight. JA 91.

[4] At O'Neal's trial, Flowers testified it took "probably less than a minute or two."

[5] Officer Curtis Bittle testified he ran almost 300 feet, and then climbed these same stairs in 20-30 seconds. Tr. 138; *see also* JA 35 n.8.

unit to the dining room: a little over a half a minute running, one minute seven seconds walking briskly, and one minute thirty-seven seconds walking at a leisurely pace. Tr. 463-66. That made it possible, the prosecutor argued, for Schlup to assist in the murder, run past all of the other prisoners, and enter the dining room a minute before the distress call went out. JA 35-36.

The defense presented the jury with nothing contradicting this. Its case consisted primarily of the videotape and the testimony of inmates Bernard Bailey and Arthur St. Peter, who occupied cells close to Schlup's. They testified that when 2 Walk was opened for lunch, they followed Schlup directly to the dining room. Tr. 445-46, 456-57.[6] The only other witness called by the defense was a caseworker, Oscar Dunbar, who notarized a document for Schlup in his cell, about one-half hour before the killing; the defense theory (which the prosecutor mocked in closing argument, Tr. 501) was that Sgt. Flowers must have escorted Dunbar to Schlup's cell, and therefore had "a mind set of Lloyd Schlup." Tr. 494. Defense counsel did not call Schlup,[7] or any of the several other inmates the videotape showed in the dining room with him, to testify about what they had seen.

After submitting several questions to the court regarding the evidence and the physical layout of the prison – and asking for, but being refused, the officers' incident reports, which were not in evidence, Tr. 512 – the jury convicted Lloyd Schlup of Arthur Dade's murder. JA 116. Later the same day – after hearing Schlup take the stand and swear that

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[6] The videotape shows the two men enter the dining room and wait in line behind Schlup. Tr. 419-20.

[7] Schlup had two prior assault convictions which were inadmissible at the guilt phase, except as impeachment. Counsel sought unsuccessfully to have admitted the statement Schlup gave to investigators on the day of his arrest, in which he denied any involvement in the murder, and said that he had gone directly from his cell to the dining room because he planned to play handball after lunch. JA 104-06. A handball was found in Schlup's pocket when he was arrested. JA 105.

he had not committed the murder of which he had just been found guilty – it sentenced him to death. JA 14.

On March 3, 1986, at the formal sentencing, Schlup was asked if he had any statement to make before sentence was pronounced. He answered, "I'd just like to say that I'm not guilty of this crime, that I had no knowledge or participation in this killing. . . . The trial – I've already been found guilty of this so it's a matter for the Appeals Court, I guess." Tr. 690. The judge then imposed the sentence of death. Tr. 689-90.

2. The First State and Federal Postconviction Proceedings.

The conviction and sentence were affirmed on appeal. *State v. Schlup*, 724 S.W.2d 236 (Mo.), *cert. denied*, 482 U.S. 920 (1987).

Schlup then filed *pro se* for postconviction relief in the Missouri courts claiming, among other things, ineffectiveness of his trial counsel. New counsel, Mark Kempton, was appointed to represent him in these state proceedings. Schlup and his family asked Kempton specifically and repeatedly to investigate the case; but by his own admission, Kempton never contacted any witness to the crime or to Schlup's whereabouts at the time it was committed. JA 72-73, 113. The postconviction petition was dismissed after a one day hearing, which went forward despite Kempton's request for more time because he had not investigated the case.[8] Without hearing

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[8] In his verified motion for continuance, Kempton stated:

> . . . [Schlup] has specifically requested and directed counsel to locate, interview and depose certain witnesses who Petitioner believes to have relevant and material information and evidence concerning Petitioner's claims herein.
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> * * * *
>
> That counsel for petitioner has not had sufficient and adequate time to conduct investigation and discovery which Petitioner has requested and which counsel believes is necessary to the proper presentation of the issues herein.
>
> * * * *

any of Schlup's exculpatory evidence, the state postconviction judge held that trial counsel had been effective and dismissed the petition. See *Schlup v. State*, No. CV187-3457CC (Circuit Court of St. Charles County, Mo., Nov. 6, 1987). On appeal, the Supreme Court of Missouri affirmed without addressing the issue. See *Schlup v. State*, 758 S.W.2d 715 (Mo. 1988).

Schlup then filed a *pro se* petition for federal habeas in the United States District Court for the Eastern District of Missouri. Again, he was given appointed counsel, David Howard. Again, Schlup and his family begged Howard to investigate, and provided him with names of witnesses who could attest to Schlup's innocence. Again, counsel talked to none of these witnesses[9] and submitted no new evidence casting doubt on his client's guilt. JA 145.

The District Court never addressed the merits of Schlup's ineffectiveness claim. Instead it incorrectly included the ineffectiveness issue among claims that it ruled summarily were procedurally barred because of Schlup's "failure to assert them at trial, to include them in his motion for new trial, to

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> That Petitioner does not intend to waive any claim or right herein. In fact, Petitioner has expressly advised counsel that he declines to waive any claim raised in his 27.26 motion filed herein or any claim which could be discovered and raised herein if counsel were allowed to conduct full and adequate discovery and investigation and adequately prepare for a hearing herein.

JA 113-14. The trial court threatened Mr. Kempton with jail if he did not go forward that day. It was later learned that it did this as a result of an *ex parte* telephone call from the Chief Justice of the Missouri Supreme Court, William Billings, insisting that the case be moved along. JA 39, 41.

[9] Howard attributed his inaction to fear of retaliation from Justice Billings. JA 44. Like all of Schlup's lawyers, Howard has confirmed that "Throughout my representation of Lloyd Schlup, he has consistently maintained his innocence. He persisted in attempting to focus counsel's efforts on the guilt phase of his trial." JA 44-45.

brief them on appeal, or to pursue them in [his] postconviction proceedings." *Schlup v. Armontrout*, No. 89-0020C(3), slip op. at 6 (E.D. Mo. May 31, 1989). See JA 162-64.

On appeal from that ruling, the Eighth Circuit did not rely on procedural bar; it affirmed the dismissal of the petition because it found that the record before it did not support the ineffectiveness claim. *Schlup v. Armontrout*, 941 F.2d 1062 (8th Cir. 1991), *cert. denied*, 112 U.S. 1273 (1992). Although the court had not seen the most persuasive evidence of Lloyd Schlup's innocence, a dissenting member of the panel commented that "[t]his was a close case" because "[t]here was conflicting evidence of Schlup's guilt and he presented a plausible alibi defense." JA 116.

3. The Second Federal Habeas Proceedings.

After *certiorari* was denied from the first habeas appeal, the case was taken over by Petitioner's present counsel from the Missouri Capital Resource Center. Through those counsel, Lloyd Schlup was able, for the first time, to gather and present the evidence of his innocence. JA 163.

That evidence was presented first to the Missouri Supreme Court, in a petition for writ of habeas corpus which was rejected summarily. JA 54-55. It was then submitted to the United States District Court, in the successive habeas petition filed below, and numerous supporting documents. JA 4-16, 26-53, 54-56, 90-129. The petition was dismissed without an evidentiary hearing (JA 87) – and without specific findings on many of its most significant allegations and affidavits. *See* JA 91, 130.

a. Petitioner's Submission.

The submission below included both direct and circumstantial evidence – none of which was presented to Lloyd Schlup's jury – which showed that Schlup was not and could not have been involved in the murder of Arthur Dade, and which undercut the credibility of the two eyewitnesses who claimed he was.

The circumstantial evidence consisted of witnesses whose testimony, combined with the videotape, proves conclusively that Schlup could not have been involved in Dade's murder.

i. Lt. Robert Faherty.

One of those witnesses was a corrections officer the prosecution had called at trial, Lieutenant (later Captain) Robert Faherty. At trial, Lt. Faherty testified that he encountered Schlup at "T-3," a secure doorway at the end of a long corridor between the housing unit and the dining room. Tr. 301. He said Schlup was the first inmate to come down the hall. Tr. 316. Faherty testified he had admonished Schlup for shouting out a window at some other inmates. Tr. 303-05. He was asked how long he had been at his post before his encounter with Schlup (Tr. 303) and how long he remained there after (Tr. 307) – but, inexplicably, he was never asked how long Schlup was in his presence.

In an affidavit submitted to the Court of Appeals below,[10] Lt. Faherty provided this additional, crucial information. Faherty says in his affidavit that, soon after he arrived at T-3, he saw Schlup walking leisurely down the corridor with his hands in his pockets – the first prisoner to leave the housing unit. JA 157. When Faherty patted Schlup down, Faherty swears, Schlup was not perspiring or breathing hard. JA 157. Most importantly, Faherty estimates it took Schlup two and a half to three minutes to walk the almost 300-foot long corridor, loiter at the window, submit to the pat-down, and leave Faherty's line of sight. JA 157-8.[11] Combining this with an

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[10] Faherty came forward after seeing a news story about Schlup's impending execution. Although it was not before the District Court, the Court of Appeals considered his affidavit. JA 152 n.4; *see also* JA 139-42, 157-58.

[11] The panel majority below suggested that Lt. Faherty's affidavit was inconsistent with his trial testimony and therefore should not be considered without adequate explanation of that inconsistency. JA 142.

estimated thirty seconds required to get from the housing unit to the corridor, the time required to travel from T-3 to the dining room, and the time Schlup was in the dining room before the radio call, Lt. Faherty's affidavit estimates Schlup was out of the housing unit for five to five and a half minutes before the radio call was made (JA 158)[12] – far too long for Schlup to have been involved in Dade's stabbing, under any scenario.

ii. Inmate Clerk John Green.

John Green was the clerk for Housing Unit 5A on the day of the murder. A few days afterward, Green was questioned by state investigators. He told them that when the fight broke out, Sgt. Flowers told him to call base and he complied, using the telephone in the housing unit office. JA 33. However, Green was not interviewed by the defense or called as a witness at trial – making it possible for the prosecution to support its theory that the call must have been made by Capt. Eberle because he was the first officer into the Unit with a radio. JA 100.

Green was never contacted by anyone acting on behalf of Lloyd Schlup until September, 1993, when Schlup's new counsel found him living on a farm in Kansas. JA 119.[13] JA 123. Although he was long out of prison and no friend of Lloyd Schlup, Green signed an affidavit which was submitted

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However, examination of the trial record will show that Lt. Faherty simply was not asked these obvious questions; and that fact is explained by the very constitutional deficiencies claimed here. JA 157, 167.

[12] Judge Heaney's dissent finds this estimate "somewhat inconsistent" with other parts of Lt. Faherty's testimony. JA 158 n.7. The perceived inconsistency may be explained by the fact, which is not spelled out in Lt. Faherty's affidavit, that there is a 40 foot hallway, two flights of stairs, and another 60 foot hallway, between T-3 and the dining room. Tr. 383. Lt. Faherty's affidavit apparently estimates – quite conservatively, we submit – that it took Schlup 1/2 minute to traverse this last distance.

[13] Green had been released from prison in 1986 and never returned. JA 123.

to the District Court in support of a motion for reconsideration. JA 121-29. Among other things, Green's affidavit stated that he made the distress call "within seconds" of Dade hitting the ground. It could not have been more than a half a minute or a minute. . . . " JA 123. Green's testimony thus makes it impossible, under any view of the evidence, for Schlup to have participated in Dade's murder: for thirty seconds to a minute before the distress call, the videotape plainly shows Lloyd Schlup in the prison dining room, quietly getting his lunch. JA 158-59.

Green's affidavit also indicates that he saw the murder, and he has identified Randy "Rocky" Jordan as "the man who held Arthur Dade while Robert O'Neal stabbed him." JA 122, 126. He also viewed a picture of Lloyd Schlup and swore that he "did not see him anywhere around when Dade was stabbed." JA 128.[14]

iii. The Inmate Eyewitnesses.

In this last aspect of his testimony, John Green joins over a dozen other inmates who saw the crime – every one of whom clears Lloyd Schlup of any involvement in it. JA 5, 8, 10. Although there are inmates who implicate O'Neal, Stewart and/or Jordan, every inmate who was present and has described what he saw has sworn Schlup did not participate in the crime and was not at the scene.

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[14] The panel majority was skeptical of Green's testimony because at Stewart's trial Green denied he saw the stabbing. JA 140. Judge Heaney's dissent commented, "While this inconsistency would need to be explored on remand, I believe it is fairly easily explained. Green was at that time still in prison and justifiably afraid for his well-being. It was probably in his interest to say that he had arrived just after the stabbing as he then indicated. Now that he has been out of prison for seven years, he no longer is afraid to let the truth be known." JA 148. Green confirms that: "I knew that Jordan and O'Neal were in the Aryan Brotherhood, and if I said I saw them do it, they could easily have me killed." JA 123.

This includes not only Randy O'Neal and Rodney Stewart[15] – the two admitted participants in the stabbing – but also numerous inmates (and former inmates like Green) who have no reason to lie for Lloyd Schlup. Some of these witnesses were African Americans unlikely to help out a white man charged with Dade's allegedly race-motivated murder.[16] JA 94-95. A few of them did not see the killing but were behind Schlup on their way to the dining room when they heard the fight; they place Schlup outside the unit when the fight started; and several of them say that, within seconds after hearing the commotion, they had to step aside for the guards running from the dining room. JA 63. Eighteen others were eyewitnesses to the killing who swear that Schlup was not involved. JA 8-11, 62-63, 121-24.

iv. The Impeachment of the Prosecution Witnesses.

In addition to all this, the evidence proffered below undermined the credibility of the only two witnesses against Lloyd Schlup, Roger Flowers and John Maylee. Both of those witnesses were portrayed at trial as consistent and reliable.[17] Petitioner's evidence shows they were neither.

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[15] Stewart also has implicated Jordan. JA 96. Most of the other inmates are afraid to name names. JA 30-31, 93-94, 150. However, since the District Court proceedings, four more have given statements to counsel identifying Jordan as the third man.

[16] Dade's assailants were alleged to be members of a white supremacist group in the prison. JA 95. As one inmate eyewitness said, "I have no reason to lie for a white guy. . . . I know for certain that Lloyd Schlup did not kill Arthur Dade, and that he was not even present when Dade was killed." JA 150.

[17] "[I]t's not just one guard. You have Sergeant Flowers watching it, and upon the eighth walk you have another guard who sees it." Tr. 486. "What it comes down to, folks, is you've got two of the three guards that are responsible for the safety of the inmates who see the stabbing take place. There is absolutely no showing that these guards have any motive to lie, that they have any grudge against Mr. Schlup." Tr. 508-09.

Both Flowers and Maylee had given testimony before Schlup's trial which contradicts key parts of what they said at trial. For example, Flowers original statement said that *both* perpetrators fled in the opposite direction from the dining room (JA 12) – another fact which, together with the videotape, was sufficient to eliminate Schlup.[18] Flowers also twice testified before Schlup's trial that Dade was loaded on the stretcher and carried out of the housing unit *before* he took Stewart downstairs and encountered Eberle.[19] Since the videotape shows that Dade was carried out of the housing unit more than half a minute *after* the guards responded to the radio call, this would mean that the call could not have come from Eberle.

Officer Maylee's various statements and testimony are similarly fraught with contradiction. Maylee's claim that he saw the fight from four floors up itself was implausible;[20] and each time he made a statement his description of what he saw changed somewhat. His deposition testimony used at Schlup's trial said that he saw Schlup, O'Neal and Stewart running against the flow of inmate traffic before Dade was stabbed; but the inter-office communication (IOC) he wrote on the day of the offense says, when he first looked, the fight was already in progress. Ex. 31. He has given at least three

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[18] Consistent with this, Flowers has recently signed an affidavit that, based on what he saw, Schlup could not possibly have been the first inmate in line in the dining room.

[19] Q. Was Dade moved before you took Stewart out?
A. Yeah

* * *

Q. So Dade is on the stretcher and being taken out.
And then you took Stewart out?
A. Took him down to base.
Deposition of Roger Flowers, July 10, 1984, pp. 22-23.

[20] Because Maylee's deposition was used in lieu of his live testimony, he was not subject to cross examination. However, trial counsel established through another of State's witnesses, Officer Dan Bower, that Maylee's ability to view the scene from the top floor of the cell block was questionable, at least. Tr. 193-205.

different versions of what he saw and where he was when he saw it, and what the various participants did during and after the assault. See JA 12-13. The only thing consistent about his story is that he did not see Sgt. Flowers. TR 338-39. But because counsel permitted his deposition to be used, none of this was brought out in cross examination.

In addition to that, there was reason to doubt these witnesses beyond their inconsistency. The testimony of Officer Maylee, John Green and several other inmate witnesses shows Flowers was away from his post when Dade was killed. JA 122. That gives him a clear motive to claim he saw the stabbing when he did not. There was an even simpler reason to doubt John Maylee's credibility: Maylee, it turns out, was a three time convicted felon – a fact Schlup's counsel learned, despite a pretrial request for all witnesses' criminal records, only during course of the appeal below. JA 171.

b. The Second Federal Habeas Proceedings.

The petition filed in District Court outlined the evidence Schlup's new counsel had by then uncovered. It named fifteen witnesses who could clear Schlup, who were unknown to Schlup or his trial counsel. JA 8-10. It alleged that seven of those had given exculpatory statements or testimony which were not disclosed to defense counsel. JA 9, 14-15, 48. It appended affidavits and transcripts supporting all of these allegations.

The District Court issued an order to show cause, to which the Respondent answered that the claims were procedurally barred, and the affidavits were vague or inconsistent with the witnesses' prior statements. JA 17-25. To support these latter arguments, the Respondent submitted an extensive set of statements given by the witnesses to prison investigators, shortly after the offense, in which some of the witnesses told the investigators they did not see the stabbing. JA 17. Petitioner filed a traverse in which he pointed out that

some of the statements submitted by the Respondent supported Schlup's case,[21] and that the inmate witnesses who were silent were fearful of being "pressured by prison officials to 'snitch' against the people who committed the murder," because the murder "was rumored to be a 'hit' of an African-American inmate (Dade) by members of the Aryan Brotherhood, a white supremacist prison gang." JA 30-31. The traverse renewed Petitioner's request to determine the credibility of these witnesses in an evidentiary hearing. JA 32-33. It also argued that there was cause for Schlup's inability to previously present this evidence, in the failure of the prosecution to disclose much of it, and the refusal of his court-appointed postconviction counsel to honor his repeated requests that they investigate his case. JA 38-53.

Although Petitioner's counsel asked to meet with the court for a status conference or argument (JA 57), no hearing of any kind was ever held. Over the ensuing months, however, counsel continued his investigation and moved to expand the record with statements of additional witnesses who had recently been located, or who were first identified in the Respondent's Exhibit T. JA 54-57, 62-64. These witnesses "either . . . saw the stabbing and [state] Mr. Schlup was not involved, or that he saw prison guards running from the direction of the dining room toward the cellblock and simultaneously heard the noise caused by the fight during which Dade was . . . stabbed." JA 63. Counsel informed the court that his investigation was continuing, and he expected to submit additional evidence to the Court as it became available. *Ibid.* Respondent objected to the motion to expand the record on procedural grounds. JA 65-67.

Without hearing argument, the District Court rejected all of Petitioner's claims, and denied his motions for an evidentiary hearing and expansion of the record. JA 87. It found no cause for the alleged procedural defaults, and no showing of a

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[21] For example, one inmate told the investigators directly "they ain't got this guy right here." JA 30 n.5. Another inmate, incredibly, was not asked what he saw, even after he admitted he saw it. JA 31.

fundamental miscarriage of justice under the standard of *Sawyer v. Whitley*, 112 S.Ct. 2514 (1992). JA 71-75. The court viewed Petitioner's evidence with skepticism, criticizing the witnesses for not coming forward earlier and noting that inmates "do not necessarily have a strong incentive to refrain from perjuring themselves." JA 79. It discussed some of the specific statements, and found none which were conclusive, or alone sufficient to prevent a conviction. JA 81-86. However, it conceded that,

> [t]he affidavits presented by Petitioner do not suffer from all the same infirmities that caused the Supreme Court to discredit the affidavits submitted by Herrera. The instant case is . . . distinguishable from *Herrera* in that Herrera was convicted on the basis of a larger quantity of evidence than was presented at Petitioner's trial.

JA 79.

> Certainly these affidavits constitute probative evidence that may or may not have swayed the jury had they been presented at trial. However, in view of the countervailing evidence that was presented, the Court cannot say that even upon consideration of all the materials currently in the record no reasonable juror would have voted to convict Lloyd Schlup of the murder of Arthur Dade.

JA 86.

Petitioner's counsel moved for rehearing, pointing out that the court had not addressed a number of the most important items of new evidence, and arguing that the case should not be evaluated under the death sentencing standard of *Sawyer v. Whitley*, 112 S.Ct. 2514 (1992) JA 91-108. A few days later, he submitted the affidavit of John Green, who had only recently been located in rural Kansas. JA 119. Counsel renewed his request for a hearing on this evidence. JA 117, 120-121. The District Court denied the motion without comment. JA 130.

The Court of Appeals panel denied a stay[22] and affirmed by a divided vote. JA 131-172. In upholding the procedural bar, the panel adopted by reference the District Court's decision that there was no "cause" for the failure to previously present the new evidence of innocence, despite the fact that Schlup had repeatedly asked his appointed lawyers to do so. JA 72-73, 133. The panel majority also found no "miscarriage of justice," applying the standard of *Sawyer v. Whitley*, 112 S.Ct. 2514 (1992), which it functionally equated with the sufficiency of the evidence rule of *Jackson v. Virginia*, 443 U.S. 307 (1979):

> Witnesses' credibility . . . is an issue reserved for the trial jury. It is not a matter within the province of the district court or of this court in a habeas proceeding.

JA 137.

Senior Judge Heaney dissented from the panel opinion. Reviewing at length the evidence of Schlup's innocence (JA 156-160, 168-70), he concluded that it both showed a "miscarriage of justice" under *Sawyer*, and a "truly persuasive" case of actual innocence under *Herrera v. Collins*, 113 S.Ct. 853 (1993). JA 166. Three dissenters from the denial of rehearing en banc agreed. "[T]here is at least a substantial likelihood that a trier of fact would consider Schlup's evidence sufficiently persuasive to meet the high *Herrera* standard if an evidentiary hearing were held." JA 174 (Arnold, C.J.).

On November 18, 1993 – the day after the Court of Appeals denied rehearing *en banc*, and the day before Lloyd Schlup's scheduled execution – the Governor of Missouri granted a stay and ordered a special panel assembled to evaluate the evidence of Schlup's innocence, and make recommendations regarding the exercise of his clemency

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[22] Apparently in response to a news report of the panel's denial of the stay, Lt. Faherty came forward with his new information. Exhibit B-2. His affidavit was considered by the Court of Appeals as a supplement to the record. JA 141, 157.

power.[23] That process is continuing.[24] On February 14, 1994, Mr. Schlup filed his petition for writ of certiorari in this Court; on March 28, 1994, certiorari was granted.

SUMMARY OF ARGUMENT

1. The Court of Appeals erred in holding that Petitioner Schlup's claim that his conviction was a miscarriage of justice – a "prototypical" claim that "the State has convicted the wrong person of the crime" – was governed by the standard of *Sawyer v. Whitley*, rather than *Kuhlmann v. Wilson*. *Sawyer* did not overrule *Kuhlmann*, but specifically endorsed it. The reasons for *Sawyer*'s exception to *Kuhlmann*'s rule do not apply when a petitioner claims, not that he is "innocent of death," but that he is "actually innocent" of the crime, "the wrong person." Plausible claims of such completely wrongful convictions are rare. The difference between a person who committed a crime and one who did not is "easy to grasp," and does not involve the "myriad of considerations" which characterize the death sentencing decisions at issue in *Sawyer*. The historic concern of this Court with innocence, the "ultimate equity on the prisoner's side," cannot be squared with a standard that requires "clear and convincing evidence" to the point that "no reasonable juror would" disagree, before

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[23] The order from the Governor staying Mr. Schlup's execution came shortly after a polygraph test was administered to John Green by Don Dunlap, a retired police officer who had served more than 15 years as Chief Polygraphist in the Kansas City, Missouri, Police Department. No deception was indicated when Green said that he saw the crime, that Schlup was not involved, and that he called base as soon as Officer Flowers told him to do so.

[24] Schlup's counsel requested and obtained an order from the gubernatorial board of inquiry granting discovery which had been denied by the District Court. This discovery, and counsel's ongoing investigation, has led consistently to more witnesses and evidence of Schlup's innocence. *See* notes 15, 18, 22, 23 above. This newly-discovered evidence will be submitted to the District Court, in a motion to vacate judgment under Fed. R. Civ. Pro. 60(b).

the courts will even hear a claim like Lloyd Schlup's: that he is both wholly innocent and unfairly convicted.

2. The Court of Appeals went even beyond *Sawyer*, to establish a "miscarriage of justice" standard equivalent to the insufficiency of the evidence rule of *Jackson v. Virginia*. Neither *Sawyer*'s language nor its logic justify that. The Court in *Sawyer* carefully refrained from adopting *Jackson*'s language; it spoke repeatedly and deliberately of what a reasonable juror "would" find, not what one "could" find if all doubts are resolved in favor of the verdict. *Jackson*'s standard was fashioned in a wholly different context: the sufficiency of the evidence at an otherwise constitutional trial. The miscarriage of justice standard, by its nature, governs claims of constitutional error. The Court's miscarriage of justice decisions require consideration of all evidence, whether constitutionally tainted or not; and *Jackson* requires that all inferences and credibility assumptions be made in favor of the verdict. To combine those disparate standards is effectively to hold that no habeas petitioner can ever show a miscarriage of justice from any constitutional violation, however egregious, other than a violation of the rule of *Jackson* itself.

3. Petitioner Schlup's showing of innocence is as strong as any that can realistically be conceived, short of a plain *Jackson* violation. It includes a videotape and the testimony of a corrections lieutenant which places Schlup far from the scene of the crime. It includes eighteen witnesses, with no apparent motive to lie to assist Schlup, who swear he was not involved. It includes the identification of the perpetrator who was involved and was misidentified as Schlup. And it explains the error, by demonstrating a lack of credibility of both of the witnesses on whom Schlup's conviction rests.

Concededly, even this case does not meet the *Jackson v. Virginia* standard the Court of Appeals applied. Nor would it meet that standard if Schlup's witnesses were all above reproach, of if there were a hundred of them instead of a dozen, or even if the witnesses who had testified against him recanted. So long as evidence exists which a juror "could" credit, and convict, relief could not be granted – in this case,

or any of the "prototypical" cases of wrongful conviction that have shaped our modern legal history.

Lloyd Schlup has shown, as clearly and convincingly as can realistically be expected, that no reasonable juror would find him guilty beyond a reasonable doubt on the evidence that has now been uncovered. He has made a showing that he is probably innocent, by evidence which is far more than colorable. He certainly has established a fair probability that a juror would have a reasonable doubt. Under any standard faithful to the requirement that habeas petitions be disposed of as justice requires, his evidence should not have been rejected by the courts below without a hearing.

I. THE COURT OF APPEALS ERRED IN ASSESSING PETITIONER'S CLAIM OF "MISCARRIAGE OF JUSTICE" UNDER A STANDARD EXTRAPOLATED FROM *SAWYER v. WHITLEY*.

The principal issue on which the judges of the Court of Appeals divided was whether Petitioner's "miscarriage of justice" claim is governed by *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), or *Sawyer v. Whitley*, 112 S. Ct. 2514 (1992).

The panel majority applied a standard drawn from *Sawyer*'s test of "actual innocence of the death penalty" to reject Lloyd Schlup's evidence that his murder conviction and death sentence were a classic case of fatal misidentification,[25] the result of defense counsel's failure to make reasonable investigations, *Strickland v. Washington*, 466 U.S. 668, 691 (1984), and the prosecution's failure to disclose known exculpatory evidence, *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Bagley*, 473 U.S. 667 (1985). Acknowledging that "appellant argue[d], with some justification, that *Sawyer* announced only a test for analyzing the fairness of the death penalty portion of a trial" and not "the guilt or innocence

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[25] *See, e.g.*, Edwin M. Borchard, Convicting the Innocent (1932); Herbert B. Ehrmann, The Case That Will Not Die: Commonwealth v. Sacco and Vanzetti (1969); Jerome & Barbara Frank, Not Guilty (1957); Erle Stanley Gardner, The Court of Last Resort (1952).

phase of the trial" (JA 134), the panel majority felt itself bound by Eighth Circuit precedent holding that *Sawyer* " 'applies equally to challenges to a conviction, not just challenges to a death sentence.' " JA 135, quoting *McCoy v. Lockhart*, 969 F.2d 649, 651 (8th Cir. 1992).

The dissenting member of the panel interpreted the reasoning and wording of *Sawyer* as establishing, quite clearly, that the Court had formulated a standard specifically for the sentencing stage of a capital case, while leaving unaltered *Kuhlmann*'s test of claims of "miscarriage of justice" at the guilt-innocence stage. JA 166 (Heaney, J.). Chief Judge Arnold and two other judges dissenting from the Eighth Circuit's denial of rehearing *en banc* in this case similarly concluded that *Sawyer* was concerned "only with the question of punishment, not that of guilt or innocence." JA 173.

Circuits other than the Eighth Circuit have interpreted *Sawyer* in the same manner as the dissenting judges below, treating *Kuhlmann* as the standard applicable to claims of "miscarriage of justice" at the guilt-innocence stage. *See, e.g., Campbell v. Blodgett*, 997 F.2d 512, 524 (9th Cir. 1992), *cert. denied*, 114 S. Ct. 1337 (1994); *Montoya v. Collins*, 988 F.2d 11, 13 (5th Cir.), *cert. denied*, 113 S. Ct. 1630 (1993). We submit that is, and should remain, the law.

A. The Assessment of "Actual Innocence" of a Crime Is, and Should Continue to Be, Governed by *Kuhlmann v. Wilson*.

To understand the precise nature of *Kuhlmann*'s and *Sawyer*'s respective roles in defining the "miscarriage of justice" doctrine, it is useful to review the emergence of the doctrine and its progressive refinement in the decisions of this Court.

When the Court first adopted the "cause and prejudice" rule for procedural defaults in *Wainwright v. Sykes*, 433 U.S. 72 (1977), it recognized the need to ensure that this rule

> will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice.

Id. at 91. However, because there was no need to define the standard further to resolve the *Sykes* case itself, the Court deferred the task of giving "precise content . . . [to these] terms . . . [to] later cases." 433 U.S. at 91.

Similarly, in *Engle v. Isaac*, 456 U.S. 107 (1982), the Court recognized that "[i]n appropriate cases those principles [of "cause" and "prejudice"] must yield to the imperative of correcting a fundamentally unjust incarceration," but left to another day the definition of the nature and contours of the "miscarriage of justice" exception. *Id.* at 135.

In *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), a plurality of the Court for the first time gave content to the "miscarriage of justice" doctrine. In doing so, it drew heavily upon Judge Henry J. Friendly's classic article, *Is Innocence Irrelevant?, Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970). The plurality stated that the prohibition against same-claim successive petitions for a writ of habeas corpus must give way when

> the prisoner supplements his constitutional claim with a colorable showing of factual innocence. This standard was proposed by Judge Friendly more than a decade ago as a prerequisite for federal habeas review generally. Friendly, *supra*. As Judge Friendly persuasively argued then, a requirement that the prisoner come forward with a colorable showing of innocence identifies those habeas petitioners who are justified in again seeking relief from their incarceration.

477 U.S. at 454 (opinion of Justice Powell, joined on this point by Chief Justice Burger, then-Justice Rehnquist, and Justice O'Connor). The plurality limited its conception of the "miscarriage of justice" exception to cases in which a petitioner can make a "colorable showing of factual innocence." *Ibid.* The dissenting Justices would have defined the

"miscarriage of justice" exception more broadly. *Id.* at 461-71 (Justice Brennan, joined by Justice Marshall); *id.* at 476-77 (dissenting opinion of Justice Stevens).

In defining the showing a habeas corpus petitioner must make to invoke the "miscarriage of justice" exception, the *Kuhlmann* plurality once again relied on Judge Friendly's analysis:

> As Judge Friendly explained, a prisoner does not make a colorable showing of innocence "by showing that he might not, or even would not, have been convicted in the absence of evidence claimed to have been unconstitutionally obtained." Friendly, *supra*, at 160. Rather, the prisoner must "show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt." *Ibid.* (footnote omitted).

Kuhlmann, 477 U.S. at 454-55 n.17. As this passage from *Kuhlmann* demonstrates, Judge Friendly's formulation was selected in lieu of less exacting standards as a means of ensuring that "successive federal habeas review . . . [would] be granted only in [those] rare cases . . . [in which] the ends of justice so require." *Id.* at 454. Yet, at the same time, the plurality, like Judge Friendly, refrained from imposing upon the petitioner a burden of proof higher than "a fair probability." This ensured an adequate " 'safety valve,' " *Harris v. Reed*, 489 U.S. 255, 271 (1989) (Justice O'Connor, concurring), for identifying those cases in which "a constitutional violation has probably resulted in the conviction of one who is actually innocent," *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

Although the *Kuhlmann* decision addressed only the context of same-claim successive petitions, other decisions extended *Kuhlmann*'s "miscarriage of justice" analysis to the adequate and independent state procedural grounds doctrine

(*Murray v. Carrier*, 477 U.S. at 496; *Smith v. Murray*, 477 U.S. 527, 537 (1986)) and the abuse-of-the-writ doctrine for new-claim successive petitions (*McCleskey v. Zant*, 499 U.S. 467, 493 (1991)). In each of these contexts, the Court held that "principles of comity and finality . . . 'must yield to the imperative of correcting a fundamentally unjust incarceration.' " *Murray v. Carrier*, 477 U.S. at 495, quoting *Engle v. Isaac*, 456 U.S. at 135.

Each of the foregoing cases called for the application of the "miscarriage of justice" doctrine to the guilt-innocence stage of a trial. *See Sawyer v. Whitley*, 112 S. Ct. at 2517-19 (reviewing the evolution of the "actual innocence" exception for "successive, abusive, or defaulted federal habeas claim[s]"). In such a context, the concept of "miscarriage of justice" is easy to grasp, for the courts can draw upon the "prototypical example of . . . the case where the State has convicted the wrong person of the crime," *Sawyer v. Whitley*, 112 S. Ct. at 2519, the classic situation of "criminal prosecutions and convictions of completely innocent people." Borchard, *supra* at 367. Though rare, such "[g]rave injustices, as a matter of fact, do arise even under the most civilized systems of law" because "[a]ll systems of law . . . are administered through men [and women], and therefore may occasionally disclose the frailties of men [and women]." Felix Frankfurter, The Case of Sacco and Vanzetti 108 (1927). Those are the kinds of cases Justice Frankfurter had in mind when he wrote, "[p]erfection may not be demanded of law, but the capacity to correct errors of inevitable frailty is the mark of a civilized legal mechanism." *Ibid.*

In *Smith v. Murray*, 447 U.S. 423 (1986), and again in *Adams v. Dugger*, 489 U.S. 401 (1989), the Court considered the applicability of the "miscarriage of justice" exception to claims relating to the sentencing stage of a capital trial. While accepting that a habeas corpus petitioner who has been sentenced to death must be permitted to invoke a "miscarriage of justice" exception in appropriate cases, the Court observed that the test formulated in *Kuhlmann* "does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense." *Smith*, 477 U.S. at 537.

Accord, Adams, 489 U.S. at 412 n.6. Because neither of these cases required a resolution of the issue, the Court expressly refrained from "undertak[ing] . . . to define what it means to be 'actually innocent' of a death sentence." *Adams*, 489 U.S. at 412 n.6.

In the wake of *Smith* and *Adams*, the lower courts developed widely disparate formulations for adapting the "actual innocence" test to the sentencing stage of a capital trial.[26] It was against this backdrop that the Court handed down *Sawyer v. Whitley*. An examination of the *Sawyer* opinion demonstrates that the Court's attention was directed solely to the task at hand – that of defining the concept of "actual innocence" of a death sentence – and that the Court neither explicitly nor implicitly re-examined the validity of *Kuhlmann*'s formulation of "actual innocence" of a crime. The Court began its opinion in *Sawyer* by explaining that:

> The issue before the Court is the standard for determining whether a petitioner bringing a successive, abusive, or defaulted federal habeas claim has shown he is "actually innocent" of the death penalty to which he has been sentenced so that the court may reach the merits of the claim.

112 S. Ct. at 2517. Noting that "the concept of 'actual innocence' is easy to grasp" as it applies to "noncapital case[s]" (*id.* at 2520), the Court reiterated that that context is governed by the standard that *Kuhlmann* derived from Judge Friendly's article. *See id.* at 2519 & n.5 (approvingly quoting *Kuhlmann*). The Court then turned to the "more difficult [task] . . . [of] develop[ing] an analogous framework" for defining the concept of " 'innocent of death.' " *Id.* at 2520.

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[26] *See, e.g., Deutscher v. Whitley*, 946 F.2d 1443, 1444-46 (9th Cir. 1991), *vacated and remanded for reconsideration in light of Sawyer v. Whitley*, 113 S. Ct. 367 (1992); *Sawyer v. Whitley*, 945 F.2d 812, 820 (5th Cir. 1991), *aff'd*, 112 S. Ct. 2514 (1992); *Johnson v. Singletary*, 938 F.2d 1166, 1183 (11th Cir. 1991) (*en banc*), *cert. denied*, 113 S. Ct. 361 (1992); *Johnson v. Dugger*, 911 F.2d 440, 468 (11th Cir.), *vacated*, 920 F.2d 721 (11th Cir. 1990); *Stokes v. Armontrout*, 893 F.2d 152, 156 (8th Cir. 1989).

The core of the "difficult[y]," as the Court explained in *Sawyer*, is that there is no conceptually obvious criterion for identifying when "the law has made a mistake" and produced a "miscarriage of justice" at the sentencing stage of a capital trial. 112 S. Ct. at 2520. At the guilt-innocence stage of a capital trial, as in noncapital cases, " 'actual innocence' " provides a "very narrow," "workable," and "relatively objective standard[];" it defines the test of when "the law has made a mistake" in terms of the "prototypical" question of whether "the State has convicted the wrong person of the crime." *Id.* at 2519-20. But a "fundamental difference between the nature of the guilt/innocence determination . . . and the nature of the life/death choice at the penalty phase" is that the penalty phase does not present a clear, focused " 'central issue' " like the question of whether the accused committed the crime; there is merely a "general concern that the penalty be tailored to the individual defendant and the offense," and the jury typically "is free to consider a myriad of factors to determine whether death is the appropriate punishment." *California v. Ramos*, 463 U.S. 992, 1007-09 (1983).[27] The Court was justifiably concerned that under a *Kuhlmann* standard of whether there is a "fair probability" that "the law has made a mistake" and has produced the wrong outcome, the vast majority of habeas corpus petitioners could invoke the "miscarriage of justice" exception by colorably claiming that some difference in the sentencing proceedings would have produced a different result.

Accordingly, the Court in *Sawyer* settled upon a formulation that would define "actual innocence of death" in terms of "eligibility to receive the death penalty" rather than "the ultimate discretionary decision between the death penalty and life imprisonment." *Sawyer*, 112 S. Ct. at 2521. Yet, as the Court recognized, even that limitation would not suffice to

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[27] *See also Satterwhite v. Texas*, 486 U.S. 249, 258 (1988) ("the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer").

ensure that "the inquiry . . . [would be the] 'narrow' exception to the principle of finality which we have previously described it to be." *Id.* at 2522. Since even eligibility for the death penalty may turn in many cases upon a highly discretionary jury judgment (such as whether " 'the offense was committed in an especially cruel, atrocious and heinous manner,' " *id.* at 2517 n.2)), some additional procedural mechanism was needed to make the inherently difficult assessment of "innocence of death" more "workable [and] . . . subject to determination by relatively objective standards." *Id.* at 2520. The Court therefore established a burden of proof higher than what it was willing to tolerate for claims of "actual innocence" at the guilt-innocence stage; it held that petitioners who wish to invoke the "miscarriage of justice" exception at the sentencing stage must

> show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law.

Id. at 2517; *see also id.* at 2523, 2525.

The Eighth Circuit erred in ignoring this reasoning and construing *Sawyer* as establishing a standard for assessing "miscarriages of justice" at the guilt-innocence stage as well as at the sentencing stage of a capital trial. As the foregoing discussion has shown, the *Sawyer* opinion focused exclusively upon the standard to be applied to claims relating to the capital sentencing context, and formulated a standard that was directly responsive to the unique aspects of the capital sentencing decision. And, to the extent that the Court commented on the standard applicable to the guilt-innocence stage, it did so by reiterating and reaffirming *Kuhlmann* as the appropriate test of "actual innocence" of the crime. *See id.* at 2518-19.

There is no reason the Court should now overrule *Kuhlmann* and extend *Sawyer*'s standard to apply to all stages of a capital case. There is no indication that the lower courts have had difficulty applying *Kuhlmann's* standard or have done so in an overbroad manner. Nor would such a change in the law "advance[] uniformity in the law of habeas corpus."

Keeney v. Tamayo-Reyes, 112 S. Ct. 1715, 1720 (1992). Neither uniformity nor reason is advanced by treating genuinely different issues or contexts as though they were the same.

Kuhlmann itself differentiated guilt-innocence claims from sentencing arguments. The plurality stated:

> [A] prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated. That interest does not extend, however, to prisoners whose guilt is conceded or plain.

477 U.S. at 452.[28] This distinction between the two stages of a capital case reflects the Court's longstanding, particularized concern for guarding against the ultimate injustice of execution or incarceration of the innocent.[29]

Moreover, as demonstrated in the earlier discussion of *Kuhlmann* and *Sawyer*, the doctrinal differences between the two standards comport with the differing issues and interests arising at their respective stages of a capital case. *Kuhlmann* adopted a somewhat lower burden of proof to guard against the risk of incarcerating or executing a wholly innocent person; the Court could afford to do so because a standard that turns upon "actual innocence of the crime" is already so

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[28] *Accord, Herrera v. Collins*, 113 S. Ct. 853, 882 n.6 (1993) (Justice Blackmun, dissenting) (those who invoke *Kuhlmann* at the guilt-innocence stage "claim[] that [they are] . . . actually innocent of the capital crime," whereas *Sawyer* was "developed . . . for prisoners who are concededly guilty of capital crimes").

[29] *See, e.g., Stone v. Powell*, 428 U.S. 465, 491 n.31 (1976) ("[r]esort to habeas corpus [is] especially . . . [appropriate] to assure that no innocent person suffers an unconstitutional loss of liberty"); *Schneckloth v. Bustamonte*, 412 U.S. 218, 256 (1973) (Justice Powell, concurring) ("Habeas corpus . . . *should* provide the added assurance for a free society that no innocent man suffers an unconstitutional loss of liberty."); *Kaufman v. United States*, 394 U.S. 217, 235-36 (1969) (Justice Black, dissenting) ("the defendant's guilt or innocence is at least one of the vital considerations in determining whether collateral relief should be available to a convicted defendant"). *See also* Friendly, *supra* at 164 ("considerations of finality should not keep a possibly innocent man in jail").

"narrow [an] exception." *Sawyer*, 112 S. Ct. at 2520. In contrast, the unfocused and inherently discretionary nature of the capital sentencing judgment required that the Court impose upon petitioners a higher burden of proof to ensure that the test of "miscarriages of justice" at the sentencing stage would be "a 'narrow' exception to the principle of finality." *Id.* at 2522.[30]

Given the historical lineage of the *Kuhlmann*-Friendly standard and its well-developed jurisprudential underpinnings, there is good reason to preserve it. As the Court has observed, modifications of habeas corpus law should promote "[c]onsiderations of certainty and stability in [the] discharge of the judicial function" by preserving standards already "[w]ell-defined in the case law . . . [and] familiar to federal courts." *McCleskey*, 499 U.S. at 496. The *Kuhlmann* standard is not only "well-defined . . . [and] familiar to federal courts" as a result of almost a decade of application, it is also a standard that is "easy to grasp" (cf. *Sawyer v. Whitley*, 112 S. Ct. at 2520), one that can be applied "with relative ease" (*id.* at 2522) and that is "rare[ly]" met (*id.* at 2519). Accordingly, the interests of "certainty and stability" (*McCleskey*, 499 U.S. at 496) – as well as those of truth and justice – weigh heavily in favor of preserving the doctrine in its present form.

B. *Kuhlmann*'s Standard Accommodates Interests and Concerns Not Addressed in *Sawyer v. Whitley*

As the preceding section demonstrated, the *Sawyer* standard was carefully framed to accommodate the unique aspects of the capital sentencing process and the respective interests

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[30] It is worth noting that when the Judicial Conference's *Ad Hoc* Committee on Federal Habeas Corpus in Capital Cases, chaired by the Honorable Lewis F. Powell, Jr., incorporated the "actual innocence" exception in its proposed legislation, the Committee limited that exception to claims of innocence of the crime, wholly excluding claims of innocence of the death penalty. *See* Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal 15, 17-18 (August 23, 1989).

of the petitioner and the State at that stage of the process. The test of "miscarriages of justice" at the guilt-innocence stage of a capital or noncapital trial should similarly accommodate the unique interests and concerns at stake in the rare case where the basic truthfinding mechanisms guaranteed by the Constitution are credibly alleged to have broken down, resulting in the conviction of the wrong person.

The *Sawyer* opinion's discussion of miscarriages of justice at the guilt-innocence stage is a useful place to begin identifying these interests and concerns. Chief Justice Rehnquist's majority opinion observes that the "prototypical example of 'actual innocence' in a colloquial sense is the case where the State has convicted the wrong person of the crime." *Sawyer*, 112 S. Ct. at 2519. The reason why this type of case serves as a "prototype" or paradigm for the judiciary's conception of a "miscarriage of justice" at the guilt-innocence stage is self-evident: our society has always been profoundly disturbed by the revelation that an innocent person has been wrongly imprisoned – or, worse, wrongly executed. *See, e.g.*, Borchard, *supra*; Frank & Frank, *supra*. The "fundamental miscarriage of justice exception, [which] is grounded in the 'equitable discretion' of habeas courts[,] [provides a mechanism] to see that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera v. Collins*, 113 S. Ct. at 862.

> [T]his Court continuously has recognized that the ultimate equity on the prisoner's side – a sufficient showing of actual innocence – is normally sufficient, standing alone, to outweigh other concerns and justify adjudication of the prisoner's constitutional claim.

Withrow v. Williams, 113 S. Ct. 1745, 1757 (1993) (opinion of Justice O'Connor). In Justice O'Connor's words, the exception serves as "a kind of 'safety valve' for the 'extraordinary case' " of the "factual[ly] innocen[t]" defendant. *Harris v. Reed*, 489 U.S. at 271 (concurring opinion).

In a case like this one, at least, *Kuhlmann* sets that "safety valve" at a sufficiently demanding level. At least

where a petitioner raises a claim like those here – constitutional violations impacting the reliability of the truthfinding process itself – a colorable showing of innocence should suffice. That is more than Judge Friendly's article would require. As the Court may recall, Judge Friendly's article not only advocated that habeas corpus be directed to correcting the injustice of convicting persons who were probably innocent; it also identified a second form of fundamental miscarriage of justice: "cases [in which] the criminal process itself has broken down," so the constitutional "attack [therefore] concerns the very basis of the criminal process." Friendly, *supra* at 151-52. "[I]n these [types of] cases," Judge Friendly maintained, "few would object to allowing collateral attack." *Id.* at 152. Judge Friendly thus viewed his two categories of miscarriages of justice – probable factual innocence and fundamental breakdown of the criminal process – as alternative bases for habeas corpus review of constitutional claims. *See id.* at 152. In a case like this one, where it is alleged that the constitutional truthfinding process has broken down repeatedly and in fundamental ways, *Kuhlmann*'s "miscarriages of justice" inquiry effectively combines Judge Friendly's categories.

Lloyd Schlup claims he has suffered a wrongful conviction *because of* a breakdown in the core safeguards of the criminal process that are designed precisely to assure against this result. Those safeguards are supposed to protect against "dubious and unjust convictions, with resulting forfeitures of life, liberty, and property.' " *In re Winship*, 397 U.S. 358, 362 (1970). Surely it must be a "miscarriage of justice" if it is true, as he has shown, that his conviction is *both* " 'dubious' " – in the sense that there exists a fair probability that the trier of fact would have harbored a reasonable doubt of his guilt if it had heard and considered all of the available evidence and its reliability, *Kuhlmann*, 477 U.S. at 455 n.17 – *and* " 'unjust' " – in the sense that the conviction resulted from a breakdown of the "very bas[e]s of the criminal process," Friendly, *supra* at 152, that ordinarily serve to guaranty against such convictions.

In this respect, also, Lloyd Schlup's case is a "prototypical example" (*Sawyer*, 112 S. Ct. at 2519) of our society's shared conception of injustice. The most infamous cases of injustice in this country are those in which an innocent person was "railroaded" as a result of police or prosecutorial prejudgment, incompetent or indifferent defense representation, local hostilities or biases, or all these things. Prime examples in our history and jurisprudence are the cases of the so-called "Scottsboro Boys"[31] and of Leo M. Frank.[32] *See generally* Michael L. Radelet, Hugo Adam Bedau & Constance E. Putnam, In Spite of Innocence: Erroneous Convictions in Capital Cases 116-118, 304 (1992).

The Scottsboro and Frank cases provide a useful illustration of the dangers of setting too high a standard for petitioners to satisfy in order to invoke the "miscarriage of justice" exception. To increase the petitioner's burden of proof to show guilt-innocence errors, by requiring the same level of "clear and convincing" proof that *Sawyer* demands at the sentencing stage, would make it unlikely that either the Scottsboro defendants or Frank would qualify as a "miscarriage." In the case of the Scottsboro defendants, "[t]he underlying facts of the case as they eventually emerged showed that the two women [complainants] had completely fabricated the story of rape;" but it took almost three decades of retrials, appeals, and clemency proceedings before the Scottsboro defendants were finally absolved of "a crime that never occurred." Radelet, Bedau & Putnam, *supra* at 118. For most of those three decades, they probably could not have satisfied

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[31] *See Norris v. Alabama*, 294 U.S. 587 (1935); *Powell v. Alabama*, 287 U.S. 45 (1932); *see also* James Goodman, Stories of Scottsboro (1994); Robert Leibowitz, The Defender: The Life and Career of Samuel S. Leibowitz 185-249 (1981).

[32] *See Frank v. Mangum*, 237 U.S. 309 (1915); *see also* Leonard Dinnerstein, The Leo Frank Case (2d ed. 1987); ROBERT SEITZ FREY & NANCY THOMPSON-FREY, THE SILENT AND THE DAMNED: THE MURDER OF MAY PHAGAN AND THE LYNCHING OF LEO FRANK (1988); Albert S. Lindemann, The Jew Accused: Three Anti-Semitic Affairs (Dreyfus, Beilis, Frank) 235-72 (1991).

a *Sawyer*-type standard of " 'clear and convincing evidence [that] no reasonable juror would find [them] [guilty].' " JA 135, quoting *Sawyer v. Whitley*, 112 S. Ct. at 2523. The Scottsboro cases certainly were ones in which the criminal process broke down, and they could have satisfied *Kuhlmann*'s standard of " 'a fair probability that, in light of all the evidence, . . . the trier of the facts would have entertained a reasonable doubt of . . . guilt.' " 477 U.S. at 454 n.17. Similarly, Leo Frank, whose "conviction had been obtained in an atmosphere of strong anti-Semitism on perjured testimony from Jim Conley, the person who probably was the real culprit" (Radelet, Bedau & Putnam, *supra* at 304), would have been denied relief under the exacting *Sawyer* standard – at least until 1982, when a critical witness came forward with unimpeachable exonerating evidence[33] – but Frank could have found refuge under *Kuhlmann*.

When this Court in *Wainwright v. Sykes* began the project of defining procedural restrictions upon the use of habeas corpus, it did not forget the historic lessons of these cases; it insisted that the one protection upon which innocent Americans could continue to depend was that the new rules would not close the doors of the federal courts to those "defendant[s] who in the absence of . . . [federal habeas corpus] adjudication will be the victim[s] of a miscarriage of justice." 433 U.S. at 91. *Kuhlmann* gave substance to that assurance, without jeopardizing the interests *Sykes* furthered. That assurance should not be withdrawn in this case.

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[33] *Ibid.*; *see also* Wendell Rawls, Jr., *After 69 Years of Silence, Lynching Victim Is Cleared*, N.Y. TIMES, March 8, 1982, at A12 (describing two Tennessee reporters' dogged investigation leading to the 1982 discovery of critical exculpatory evidence in the Leo Frank case).

II. THE COURT OF APPEALS ERRED IN CONSTRUING *SAWYER v. WHITLEY* TO ESTABLISH AN INSUFFICIENCY-OF-THE-EVIDENCE STANDARD EQUIVALENT TO THAT OF *JACKSON v. VIRGINIA*

In the event that this Court chooses to apply *Sawyer v. Whitley* to the guilt-innocence stage of a capital trial, and even to claims of complete factual innocence like Lloyd Schlup's, it will have to address the second issue presented by this case: whether the Court of Appeals erred in interpreting *Sawyer* as establishing an insufficiency-of-the-evidence standard equivalent to that of *Jackson v. Virginia*, 443 U.S. 307 (1979).

Although the Court of Appeals did not explicitly state that it was equating *Sawyer*'s standard with *Jackson*'s, the logic of its decision makes clear that it did so. Deeming dispositive the fact that there was eyewitness testimony supporting Schlup's conviction, the Court of Appeals refused to examine the credibility of that testimony or to weigh it against contrary evidence:

> At trial, as noted by the district court, two prison officials, who were eyewitnesses to the crime, positively identified Mr. Schlup as one of the three perpetrators of the murder. This evidence was clearly admissible and stands unrefuted except to the extent that Mr. Schlup now questions its credibility. Witnesses' credibility, however, is an issue reserved for the trial jury. It is not a matter within the province of the district court or of this court in a habeas proceeding. Federal habeas, as explained in *Herrera*, does not provide a forum for the retrial of a convicted felon. *Herrera v. Collins*, 113 S. Ct. 853, 860-61 (1993). So, even if we disregard the source of the new evidence, the eleventh-hour nature of the information, and a presentation coming almost six years after the trial; it is simply not possible to say that the appellant has shown by clear

and convincing evidence that but for a constitutional error no reasonable jury would have found him guilty.

JA 137-38 (emphasis added). Its affirmance of the District Court's refusal to permit discovery, expansion of the record, or an evidentiary hearing was necessarily premised on its belief that no amount of new evidence could make a difference.

The Court of Appeals majority thus equated *Sawyer*'s test with *Jackson*'s, which measures the sufficiency of evidence at trial to support a conviction and holds that proof of guilt is constitutionally insufficient only where there is no evidence from which a rational fact-finder "could" have found all elements beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *see Wright v. West*, 112 S. Ct. 2482, 2485-86 (1992). The dissenting judge below took a different approach, carefully evaluating the additional proffered evidence and concluding that a jury that heard all of the evidence might well be compelled to acquit Lloyd Schlup. JA 159-160, & n.8 (Heaney, J.) ("Had trial counsel presented the exculpatory eyewitnesses now presented, the jury would have received the full picture of Dade's murder, and if it were to credit the new evidence, it would have no choice but to acquit.")

The lower court majority's equation of *Sawyer* with *Jackson* overlooks the careful language this Court used in announcing its standard in *Sawyer*. This Court quite clearly stated that the question to be addressed is whether, in the absence of constitutional error, a "reasonable juror *would* find [the petitioner] eligible for the death penalty." *Sawyer*, 112 S. Ct. at 2523 (emphasis added). The Court's choice of language in *Sawyer* obviously was quite deliberate, for it settled upon this formulation only after giving consideration to both a "would" and a "could" formulation. As the Court related:

> The [Fifth Circuit] Court of Appeals in this case . . . adopted this test:
>
> "[W]e must require the petitioner to show, based on the evidence proffered plus all record evidence, a fair probability that a rational trier of fact *would have entertained a reasonable doubt* as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty." 945 F.2d, at 820 (footnotes omitted).

* * *

The Eleventh Circuit articulated the following test:

> "Thus, a petitioner may make a colorable showing that he is actually innocent of the death penalty by presenting evidence that an alleged constitutional error implicates *all* of the aggravating factors found to be present by the sentencing body. That is, but for the alleged constitutional error, the sentencing body *could not* have found *any* aggravating factors and thus the petitioner was ineligible for the death penalty. In other words, the petitioner must show that absent the alleged constitutional error, the jury would have lacked the discretion to impose the death penalty; that is, that he is *ineligible* for the death penalty." *Johnson v. Singletary*, 938 F.2d 1166, 1183 (CA11 1991) (emphasis in original).

Sawyer, 112 S. Ct. at 2522-23 & n.15 (emphasis added to quotation from Fifth Circuit decision). Having examined these two alternatives, the Court adopted the standard employed in the Fifth Circuit:

> Therefore we must determine if petitioner has shown by clear and convincing evidence that but for constitutional error, no reasonable juror *would* find him eligible for the death penalty under Louisiana law.

Sawyer, 112 S. Ct. at 2523 (emphasis added). In at least five passages, the majority opinion in *Sawyer* refers to the standard being adopted as whether a reasonable juror "*would* find the defendant eligible for the death penalty." *See id.* at 2517, 2523-25 (emphasis added).

The distinction between "could" and "would" becomes even clearer if one considers the potential impact of a *Jackson* type standard on prototypical cases like those of the Scottsboro defendants and Leo Frank. We observed earlier that not for decades after those cases were tried would the evidence available to the defense have sufficed to meet the standard which the Eighth Circuit derived by transposing *Sawyer* to the guilt-innocence stage. This is so because most of the doubt-creating evidence in these cases, and certainly the most persuasive evidence of the defendants' innocence, emerged only in the wake of two generations of investigation and scholarly research. *See* pages 33-34 above.

But even now, with all we know about the cases in the fullness of history, the Scottsboro defendants and Leo Frank would not be able to satisfy a *Jackson*-type test of "miscarriage of justice." Notwithstanding the questionable aspects of the prosecution witnesses' testimony in the Scottsboro case, there was evidence of guilt the jury "*could*" have believed. *See* GOODMAN, *supra* at 13-14; LEIBOWITZ, *supra* at 206-23. Similarly, in Leo Frank's case, the jury "*could*" have believed the carefully coached lies of the actual murderer, Jim Conley. *See* DINNERSTEIN, *supra* at 40-47; FREY & THOMPSON-FREY, *supra*, at 37-40; LINDEMANN, *supra* at 254-56. Indeed, when Leo Frank was pardoned, posthumously, in 1986, the Georgia Court of Pardons stated that " 'it is impossible to decide conclusively the guilt or innocence of Leo M. Frank.' " LINDEMANN, *supra* at 235 n.2.

The Scottsboro and Frank cases also serve to illustrate the extent to which a *Jackson*-type standard would impede a reviewing court from giving due consideration to evidence of innocence proffered by the defense. If, as in these cases, a defendant elected to testify at trial but was nonetheless convicted, the Court of Appeals' standard would require that the reviewing court dismiss on the ground that the trier of fact "could" (and, indeed, did) find the testimony unworthy of belief. *Cf. Wright v. West*, *supra*. This conclusion would be compelled even if, as in the Scottsboro case, any contradictions in or apparent "incoheren[ce]" of a defendant's testimony (Goodman, *supra* at 14-15) can be attributed to

inadequate preparation on the part of defense counsel or an innocent person's fear of being wrongfully convicted. Indeed, the Court of Appeals' standard would require that a reviewing court disregard the account of a defendant who took the stand – even if, as in Leo Frank's case, the defendant's words " 'carried the ring of truth in every sentence.' "[34] While this Court's formulation of the standard in *Sawyer* permits a reviewing court to examine whether a reasonable trier of fact "would" have credited the defendant, the Court of Appeals' more restrictive test requires dismissal of the defendant's testimony simply because a trier of fact always "could" choose to disbelieve a witness.

Under the *Jackson*-type standard adopted by the Court of Appeals below, affirmative evidence of innocence *never* satisfies the "actual innocence" test because the record of conviction is invariably based upon other evidence that a jury *could* believe. Indeed, even if a petitioner came forward with incontrovertible evidence of innocence – such as, for example, "a videotape of the crime" (*Arizona v. Fulminante*, 111 S. Ct. 1246, 1266-67 (1991) (Kennedy, J., concurring)) or proof that "another person has credibly confessed to the crime" (*Sawyer*, 112 S. Ct. at 2519) – the habeas corpus court would still be bound to deny consideration of the petition if there is any prosecution evidence, no matter how weak or impeachable, that the jury *could* have believed.

Finally, a *Jackson* standard would eviscerate what is often the most important part of a showing of "actual innocence": the presentation of exculpatory witnesses who were not called at trial because the defense attorney failed to conduct an adequate investigation or was misled by the prosecution into thinking that no such witnesses existed. Exculpatory witnesses, no less than prosecution witnesses, may suffer from "the 'erosion of memory' . . . that occur[s] with the passage of time that invariably attends collateral attack." *Kuhlmann v. Wilson*, 477 U.S. at 453. And even without

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[34] Dinnerstein, *supra* at 51 (quoting a local newspaper, the *Atlanta Constitution*); *see also* FREY & THOMPSON-FREY, *supra* at 147-57.

memory lapses, a *Jackson* standard would appear to require that the reviewing court dismiss the witnesses' account in favor of any evidence which supports the verdict – even though the court is convinced that no reasonable trier of fact "would" refuse to credit the new, exculpatory evidence.

That this Court did not intend the application of such a restrictive standard is evident not only from its careful wording in *Sawyer*, but also from the past decisions which it chose to quote approvingly in *Sawyer*. In its explanation of the standard to be applied at the guilt-innocence stage, the Court quoted *Kuhlmann*'s explanation that:

> "[T]he prisoner must 'show a fair probability that, in light of *all* the evidence, including that alleged to have been illegally admitted (*but with due regard to any unreliability of it*) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt.' "

Sawyer, 112 S. Ct. at 2519 n.5 (quoting *Kuhlmann*, 477 U.S. at 455 n.17, quoting Friendly, *supra* at 160) (emphasis added). *Jackson* admits no "regard" for "unreliability;" all inferences any reasonable person could draw, must be drawn in favor of the verdict.

The Court of Appeals' rigidly narrow approach is the very antithesis of the flexible, balanced standard envisioned by Judge Friendly and adopted by the Court in *Kuhlmann* and *Sawyer*. This Court in *Sawyer* also approvingly quoted Justice O'Connor's statement for the Court in *Smith v. Murray*, *supra*, that "the habeas petitioner . . . had failed to show actual innocence of the death penalty because the 'alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones.' " *Sawyer*, 112 S. Ct. at 2519, quoting *Smith*, 477 U.S. at 538. But the *Jackson* standard applied by the Court of Appeals below would prevent a reviewing court from considering whether the alleged constitutional error had "precluded the development of true facts," for any "true fact" "could" be disregarded or found incredible by a finder of fact.

Finally, it is important to recognize that in a case such as this – where ineffectiveness of counsel and the suppression of evidence prevented the jury from hearing critical testimony on the question of the defendant's commission of the crime – an incorporation of a *Jackson* standard into the *Sawyer* doctrine would frustrate the very principles that led to the Court's adoption of the *Jackson* standard as a test of constitutional sufficiency of the evidence. The *Jackson* standard was carefully designed to assure that reviewing courts would not impinge upon the fundamental role of the jury (or judicial fact-finder):

> This . . . standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law.

Jackson, 443 U.S. at 319 (footnotes omitted) (emphasis in original). The *Jackson* decision naturally assumed a situation in which the jury or judicial fact-finder has actually heard "all of the evidence," since the issue before the Court was how a reviewing court should assess the constitutional sufficiency of the evidence presented at trial. The situation is necessarily very different when the jury has *not* heard critical evidence bearing on the petitioner's innocence. In such situations, *Jackson*-type deference to the jury's original credibility determinations is misguided, for the jury made its assessments without the benefit of critical evidence. *Cf. Sullivan v. Louisiana*, 113 S. Ct. 2078, 2081-82 (1993); *Carella v. California*, 491 U.S. 263, 269 (1989) (Justice Scalia, concurring). Indeed, application of a *Jackson* standard in such a situation actually turns *Jackson* on its head, for it serves to deprive the jury of

any meaningful function in the criminal process. It conclusively presumes that the jury "would" have reached the same conclusion as to the petitioner's guilt even after hearing the new evidence, simply because the jury "could" have chosen to continue to believe an item of the incomplete evidence presented at the original trial.

The standard actually adopted by the Court in *Sawyer* and *Kuhlmann* is far more consistent with "[t]he right to trial by jury . . . [and] [the underlying] 'profound judgment about the way in which law should be enforced and justice administered.' " *Sullivan*, 113 S. Ct. at 2083 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968)). It asks the question whether " ' "the trier of the facts would have entertained a reasonable doubt of [the petitioner's] guilt" ' " if the jury or judicial fact-finder had heard and weighed

> " 'all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial.' "

Sawyer, 112 S. Ct. at 2519 n.5 (quoting *Kuhlmann*, 477 U.S. at 455 n.17, quoting Friendly, *supra* at 160). That standard, not *Jackson*'s, is the one that should be applied to assess claims of "actual innocence" at the guilt-innocence stage of a capital trial. The Court of Appeals erred in holding otherwise.

III. UNDER ANY PROPER STANDARD, PETITIONER'S SHOWING ESTABLISHES "ACTUAL INNOCENCE" AND A "MISCARRIAGE OF JUSTICE".

As the dissenting judges below found, the case for Lloyd Schlup's innocence is so strong that it establishes, *prima facie*, a "miscarriage of justice" under any standard less demanding than the impossible one utilized by the panel majority below. The evidence that Mr. Schlup is innocent of this crime is more than extraordinary; it approaches a conclusive demonstration of innocence as closely as realistically can be conceived. Although Schlup's case is not celebrated, in

many ways the evidence of his innocence is stronger, even, than the evidence for the defendants in the historic cases discussed above.

Mr. Schlup's case begins, of course, with the videotape which shows him at the head of the line of inmates in the prison dining room, moving slowly through the line and quietly getting his meal – for a full minute before the call went out that a fight had broken out back in his living unit. To discount the incontrovertible evidence on the videotape, it is necessary to assume:

> – that Schlup participated in the stabbing and then rushed to the head of the line of all the other prisoners from the unit, in full view of at least one correctional officer, without anyone noticing;
>
> – that none of the inmates Schlup ran past would have mentioned that fact to the prison investigators who questioned them shortly afterwards;
>
> – that Schlup did this and went through the checkpoint between the unit and the dining room (at T-3), submitting to a search, without perspiring or breathing hard and without getting any trace of blood or other incriminating evidence on his clothes or person; and
>
> – that Schlup openly talked to prison investigators within minutes of his arrest, long before the existence of the videotape was known, and say nothing that was not later confirmed. (See JA 105-06).

It is also necessary to ignore the fact, which the tape also reveals, that Schlup moved slowly through the dining room cafeteria line, picked up his meal, and started to eat, on his own; but both O'Neal and Jordan came in late, went around the line, sat together, and looked around suspiciously, O'Neal "dripping blood."

Against Schlup's inept defense, the prosecution was able to convince the jury to make all those assumptions, and ignore those counterindications. To do so it had to accept the greatest time estimates of both Sgt. Flowers (regarding the time it took him to get Rodney Stewart under control) and Capt. Eberle

(regarding the time it took him to get to the scene). If either of those estimates were too great, Schlup could not be guilty; and there was evidence inconsistent with both of them. *See* notes 4 and 5, above.

The baseline of evidence on which the jury's verdict rested was therefore "close" and Schlup's defense "plausible." JA 116. Against that, Schlup's submission below raised doubts too strong for any reasonable juror to ignore.[35]

To begin with, to convict Schlup on the present record a juror would have to find that both Lt. Faherty and John Green are lying. Combined with the videotape, any of the things Lt. Faherty says – that Schlup was the first inmate out of the unit; that he watched him walk down the full length of the corridor to T-3; that Schlup was not agitated or breathing hard when he searched him; and that Schlup was in his presence for two and a half and three minutes – nearly conclusively establishes Schlup's innocence.

So does John Green's testimony. If Green made the call to base within seconds of the stabbing – as he told the prison investigators, and as he swears now – the stabbing occurred at a time the tape shows Schlup in the dining room. In addition, if Green is telling the truth, Flowers did not actually see the stabbing – but had reason to falsely claim he did because he was away from his post. And, of course, Green swears that he saw the third perpetrator, and it was Randy Jordan. JA 126. There is ample evidence corroborating that.[36] Green has no

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[35] *Cf. Strickland v. Washington*, 466 U.S. 668, 696 (1984): "A verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."

[36] Jordan occupied a cell between O'Neal and Stewart; Schlup's cell was six cells away, outside a door that closed off the part of 2-Walk where Jordan, Stewart and O'Neal lived. Exhibit A. Stewart claims that he, Jordan and O'Neal had planned the stabbing, but that he had backed out at the last minute. JA 96. Several other inmates have now also named Jordan. See 15, above. Lt. Faherty identifies Jordan as a known enforcer for the Aryan Brotherhood. Exhibit B-2. Jordan generally resembles Schlup and could easily be mistaken for him by eyewitnesses who got the fleeting glances

connection to Lloyd Schlup and has been a free citizen for eight years. Other than the fact that he once denied having seen the murder – for which he gives the plausible explanation that he feared retaliation, *see* JA 123 – the Respondent has never suggested why Green would risk perjury charges to help out a known murderer.[37] Yet unless that is what both he and Lt. Faherty have done, Lloyd Schlup cannot have committed this crime.

Schlup's claim of innocence is powerful, even without the inmate testimony which the lower courts categorically rejected. Alone, and in another case, evidence from prison inmates might be so suspect as to be categorically disregarded. But it strains credulity that even close friends of the victim, who were with him when he was killed, would lie to spare one of the killers, while identifying two others. Such a scenario is particularly implausible here, where the victim and the closest witnesses on one side, and the killers on the other, are divided by racial and prison gang lines. And that scenario becomes incredible when it is not just a few, but *every single one* of the eyewitnesses who have been identified and given statements, who attest that Lloyd Schlup was not involved.

Against this mounting evidence – gathered without the tools of formal discovery, under the constraints of the prison environment, and years after the fact – the State's case remains what it was at trial: Roger Flowers and John Maylee. Even as their testimony came in at trial, it was evident that it

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Flowers and Maylee claimed to have had. *See* JA 126, 128. And, as noted above, the videotape shows Jordan slip around to the back of the dining room, behind O'Neal, and join him. JA 96.

[37] Lt. Faherty's affidavit says "While it is true that many inmates cannot be believed, this is not true of all the men who say they saw the crime. John Green, Jack Babcock, Emmett Nave, Joe Beck, and Arthur St. Peter are people who have never lied to me, and I would listen to what they have to say, especially John Green." Exhibit B at 2. As noted above, on the eve of Schlup's execution, Green was given and passed a polygraph, given by a qualified police polygrapher, on all aspects of his statements. *See* notes 23, 24, above.

was subject to the doubts that often accompany eyewitness testimony.[38] That alone, would be sufficient, even now, to square these witnesses' statements with the evidence of Schlup's innocence. But there is more: not only inconsistencies in the testimony the jury never heard, but very real reasons to doubt the credibility of both of these men. *See* pages 14-15 above.

The combination of all this evidence, we submit, goes far beyond raising a reasonable doubt. The evidence of Lloyd Schlup's innocence is substantially stronger than the evidence of his guilt. It is clear and convincing. Though no standard could ever impose such a burden, we believe it approaches proof beyond a reasonable doubt. Certainly, it would be more than enough evidence to support a conviction of Randy Jordan as the third man involved in Arthur Dade's murder.

As Schlup's counsel argued below, even before Lt. Faherty came forward:

> Petitioner has presented a truly persuasive case of innocence. Mr. Schlup has now produced affidavits and statements of fifteen eyewitnesses to the stabbing of Arthur Dade; a videotape showing that he was in the prison dining room when Arthur Dade was stabbed; statements of witnesses who corroborate the fact that the corrections [officers] ran out of the dining room more than a minute after petitioner entered the room, but within seconds of Dade's stabbing; and numerous contradictions and inconsistencies in the testimony of the state's identification witnesses. Furthermore, petitioner has produced sufficient evidence to obtain an indictment and support a conviction against the real culprit, Rocky Jordan. What more would a petitioner

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[38] "The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228 (1969).

> have to show this Court to prevent his execution without a hearing?

JA 120

The courts below never answered this question, but rejected Schlup's evidence without hearing it. To take such a step without permitting discovery or hearing testimony, they should have indulged every inference, and assumed every factual dispute would be resolved, in Lloyd Schlup's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Blackledge v. Allison*, 431 U.S. 63, 80 (1977) (summary judgment procedures may apply in habeas cases). They did not do that because of the view they took of the miscarriage standard, which made all evidence of innocence irrelevant so long as there was constitutionally sufficient evidence of guilt. See pages 40-41 above.

Again, we submit, that cannot be the law – if for no other reason, because it would permit a capital conviction as doubtful as Lloyd Schlup's to stand. To accept a risk of error as great as the one shown here cannot be what "law and justice require." 28 U.S.C. § 2243. There is too much reason for doubt here to be "satisfied that the interests of justice will not be served by [further] . . . inquiry." 28 U.S.C. § 2244(a).

CONCLUSION

The decision of the Court of Appeals should be reve
The case should be remanded for development of the ev
and a determination of whether a miscarriage of justi
occurred here, under the appropriate constitutional st

Respectfully submitted,

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EXHIBIT A

RELATIVE CELL/WITNESS LOCATIONS IN HOUSING UNIT 5A
Missouri State Penitentiary, February 3, 1984

	70. LLOYD SCHLUP	43. {RICKY EASELY}	
	71.	44.	
GATE	86. ARTHUR S. PETER**	45. {MAURICE FORD}	GATE
	85. [KIRBY ROGAN]	46. JOE BECK***	
	84.	47. <*CHARLES WARD**>	
⬆	83. BERNARD BAILEY**	48. *VAN ROBERSON****	⬆
EXIT	82. RODNEY STEWART***	*49. <A. PHILLIPS***>*	EXIT
	81. [RANDY JORDAN]	50. DONNIE TRENDLY***	
2	80. ROBERT O'NEAL***	51. <AL FRANCO***>	1
W	79. <*WILLIE HILL****>	52. {JEFF SMITH}	W
A	78. [PRUITT]	53. *C. LOVELACE****	A
L	77. *LAMONT GRIFFIN****	54. [WILLIE ROSS]	L
K	76. *WILLIAM FOSTER**	55. *DONNELL WHITE****	K
	75. <*GARY RILEY****>	56. MICHAEL DUNN***	
	74. [JAMES LEWIS]	57. [BROWN]	
	73.	58. *ARTHUR DADE*	
	72. *JAMES PIERCE****	59. STANLEY PRICE***	
GATE		60. JOHN GREEN***	
		61.	
		62. WARREN JOHNSON†	
		63. [BRIAN STROTHERS]	
		64. GARY SONNENBERG***	
		65. *RICKY MCCOY****	

Key

***Eyewitnesses who state Schlup was not involved
** Alibi witnesses who place Schlup outside the Unit
*Witnesses who provide circumstantial evidence for Schlup's alibi
†Warren Johnson believes Dade is not dead

< >Statements not in lower court record
[ ] Not yet located/deceased
{ } Refuse interviews

Italics designate African-Americans

EXHIBIT B

AFFIDAVIT OF ROBERT FAHERTY

Comes now affiant, Robert Faherty, and first being duly sworn, states as follows:

1. I was employed as a corrections officer for the Missouri Department of Corrections from September of 1979 to February of 1989, when I left the department at the rank of captain. In February of 1984, I was a lieutenant. The entire time I was with the department, I was stationed at the Missouri State Penitentiary in Jefferson City, Missouri.

2. On February 3, 1984, I was the Zone Lieutenant for the Special Management Unit. Attached to this affidavit is an accurate diagram of the corridor leading to the area where I was stationed. At lunch time, I was stationed in the dining room. Because no one was available to watch the T-3 door, I stood at that station until I could be relieved by another officer. Then I went to the dining room.

3. The door at T-3 is supposed to be locked except when opened by an officer for inmate movement in and out of the dining room. It is secured at all times. The door was locked when I arrived at the station, and I signalled base control to unlock the door. The officer in the control center unlocked the door by remote control. I opened the door and pushed it back so it would stay open for the lunch traffic.

4. A few seconds after I opened the door, I saw Lloyd Schlup coming down the corridor toward me. He was walking a leisurely pace with his hands in his

pockets. There was nothing unusual about him. Lloyd stopped at a window a few feet from me and shouted at someone outside. I told him to get out of the window, and he came over to the door where I was standing. I patted him down, and he went on to the dining room. Lloyd was not perspiring or breathing hard, and he was not nervous. There was nothing at all about his behavior consistent with his just having been involved in a fight or a stabbing.

5. Other prisoners came down the hall behind Mr. Schlup. Shortly after my encounter with Mr. Schlup, I was relieved by another officer, who I think was Curtis Bittle. I then went to the dining room. I was standing at the rail by the serving line with officer Clementage when I heard an assault broadcast over my radio, and officers ran to the housing unit. I ran with them, but I never made it to the housing unit because I met Captain Eberle at the bottom of the stairs leading to the housing unit, and he sent me outside to recover the weapon that was used in the assault.

6. I have re-enacted my encounter with Mr. Schlup, and I can accurately state that Mr. Schlup was in my presence for at least two and a half minutes, and possibly three minutes. It would have taken him about thirty seconds to get from his cell to my line of sight. After he left me, he had another twenty-five to thirty-second walk to get to the dining room. He arrived in the dining room at least four to four and a half minutes after he left the housing unit. He was in the dining room for a little over a minute when I received the radio call. I am positive that when I received the call, Mr. Schlup had left the housing

unit at least five to five and a half minutes earlier. I do not see how he could have been involved in the stabbing.

7. I am familiar with many of the prisoners who have said that they saw the crime, and while it is true that many inmates cannot be believed, this is not true of all the men who said they saw the crime. John Green, Jack Babcock, Emmett Nave, Joe Beck and Arthur St. Peter are people who have never lied to me, and I would listen to what they have to say, especially John Green. I always thought he would succeed when he got out of prison. He was a unit clerk because he was more credible, reliable and trustworthy than other prisoners, and because he had at least minimal office skills. I am also familiar with Randy Jordan. He was known in the prison by officers and inmates alike as a person in the upper echelon of the Aryan Brotherhood. He had been in many rough prisons across the country and had a reputation as an "enforcer" for the Brotherhood. He was covered with tatoos; I remember one in particular that went clear across his back with the eagle wing symbol of the Aryan Brotherhood. I don't really know Lamont Griffin Bey, Ricky McCoy or Stanley Price, so I can't say anything about them one way or another.

8. At the time of the stabbing, it was written procedure in the housing unit that only one walk would be released for lunch at a time, and the next walk would not be released until all of the prisoners from the other walks had cleared the housing unit. This procedure was not followed on February 3, 1984, because prisoners from two walk were able to get to one walk. This would not have happened had procedure been followed. Sargeant

Flowers was the Housing Unit supervisor, and it would have been up to him to follow post orders.

9. I testified at Lloyd's trial, but I was never asked how long Lloyd and I were together in the hall. I have never talked to a defense attorney about Lloyd's case before today. When I was a corrections officer, I was cynical about prisoners and I believed that they were all guilty, and I would not have voluntarily come forward to talk with a defense lawyer. If a defense lawyer had come to see me, I would not have lied to him, but I wouldn't have volunteered any information, either. It is kind of an unwritten rule among corrections officers not to cooperate with defense lawyers.

10. Lloyd Schlup could not be guilty of this crime. Over the ten years I was at MSP, 1 have seen many fights and stabbings, and the prisoners involved are invariably mad, scared, excited, out of breath, or otherwise obviously hyped up on adrenalin. Lloyd was not any of those things. Also, after learning of all the information in the article, I know that it is not possible that Lloyd could have spent as much time with me as he did and still have been involved in the crime. I have looked at the affidavits and statements of various prisoner, and I recognize several of them as people who are more credible than the typical inmate.

11. I live alone, and I do not have a telephone. A friend read an article in the Columbia Missourian about Lloyd's case and mentioned it to me. I called the paper from a public phone, and they put me in touch with Bill Curry. I am coming forward now because, based on what

I know, Lloyd Schlup cannot possibly be guilty, and saying what I know is the right thing to do.

12. I am willing to testify in court.

FURTHER, AFFIANT SAYS NAUGHT.

/s/ Robert Faherty
Robert Faherty

State of Missouri)
) ss
County of Jackson)

Subscribed and sworn before me this 26th day of October, 1993.

/s/ Beverly S. Taylor
Notary Public

My commission expires:

11/3/93

BEVERLY S. TAYLOR
Notary Public – State of Missouri
Commissioned in Clay County
My Commission Expires
Nov. 3, 1993